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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
AT TACOMA

10 KEITH L. NASH,

11 Petitioner,

12 v.

13 TONY SHAVER.

14 Respondent.

CASE NO. 3: 11-CV-5696RJB

REPORT AND
RECOMMENDATION

NOTED FOR OCTOBER 28, 2011

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16 This petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 has
17 been referred to United States Magistrate Judge J. Richard Creatura pursuant to 28 U.S.C.
18 § 636(b) (1) (A) and (B), and local Magistrate Judge Rules MJR3 and MJR4. Petitioner
19 has paid the filing fee. Review of prior filings by Mr. Nash shows that he has previously
20 filed a petition for habeas corpus challenging the same conviction and sentence that he
21 challenges in this petition. The conviction and sentence at issue is a 1999 Lewis County
22 conviction for second degree rape of a child. The prior habeas corpus petition was 04-cv-
23 5785FDB.
24

1 The court recommends this petition be transferred to the Ninth Circuit as second
2 or successive.

3 DISCUSSION

4 Generally, a petition is ‘second or successive’ if it raises claims that were or could
5 have been adjudicated on their merits in an earlier petition.” Cooper v. Calderon, 274
6 F.3d 1270, 1273 (9th Cir. 2001) (because petitioner was aware of the factual basis for the
7 claim of ineffective assistance of counsel, but failed to file it in the first petition, the
8 district court was correct in dismissing it under § 2244). The Antiterrorism and Effective
9 Death Penalty Act (“AEDPA”) implemented a gatekeeper function, requiring that
10 successive § 2254 petitions be dismissed unless they meet one of the exceptions outlined
11 in 28 U.S.C. § 2244 (b)(2). Under that provision, a successive application is permissible
12 only if it rests on a new rule of constitutional law, if there are facts that were previously
13 unavailable, or there are facts that would be sufficient to show constitutional error in the
14 petitioner’s conviction. 28 U.S.C. § 2244 (b)(2); see Cooper, 274 F.3d at 1275. If the
15 petition is second or successive, then the petitioner must seek authorization from the
16 court of appeals before filing the new petition with the district court. 28 U.S.C. § 2244
17 (b)(3).
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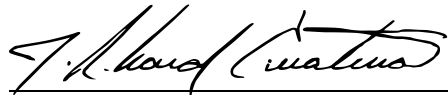
19 The Ninth Circuit Rule 22-3 (a) provides guidance:

20 Any petitioner seeking leave to file a second or successive 2254 petition or
21 2255 motion in district court must seek leave under 28 U.S.C. §§ 2244 or
22 2255. An original and five copies of the application must be filed with the
23 Clerk of the Court of Appeals. No filing fee is required. If a second or
24 successive petition or motion, or application for leave to file such a petition
or motion, is mistakenly submitted to the district court, the district court
shall refer it to the court of appeals.

1 Accordingly, the court recommends that this petition be transferred to the court of
2 appeals and that the case administratively closed.

3 Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the parties shall have
4 fourteen (14) days from service of this Report to file written objections. See also Fed. R.
5 Civ. P. 6. Failure to file objections will result in a waiver of de novo review by the
6 District Court Judge. See, 28 U.S.C. 636 (b)(1)(C). Accommodating the time limit
7 imposed by Rule 72(b), the clerk is directed to set the matter for consideration on October
8 28, 2011 as noted in the caption.

9 Dated this 27th day of September, 2011.

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12 J. Richard Creatura
13 United States Magistrate Judge
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